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No. 90-1787

Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

LUDLOW PARK HOMEOWNERS ASSOCIATION, INC., ET AL.

v.

COUNTY OF WESTCHESTER, NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly took jurisdiction of this proceeding under the All Writs Act, 28 U.S.C. 1651.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not reported, but the decision is noted at 930 F.2d 909 (Table). The district court opinion (App., *infra*, 1a-9a)[1] is reported at 741 F. Supp. 1126.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1991. The petition for a writ of certiorari was filed on May 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Because the version of the district court opinion reprinted at Pet. App. A5-A11 contains several material omissions, we have reprinted the opinion in its entirety as an Appendix to this brief.

STATEMENT

This case arises out of a proceeding commenced in state court by petitioners (Ludlow Park Homeowners Association, Henry Spallone as Mayor of the City of Yonkers, and G. Oliver Koppell as Assemblyman for the 80th Assembly District) under Article 78 of the New York Civil Practice Laws and Rules, N.Y. Civ. Prac. L. & R. §§ 7801-7806 (McKinney 1981 & Supp. 1991), challenging respondent Westchester County's decision to install sludge dewatering equipment at the existing Yonkers Joint Wastewater Treatment Plant without first preparing an environmental impact statement under New York State's Environmental Quality Review Act, N.Y. Envtl. Conserv. Law §§ 8-0101 *et seq.* (McKinney 1984 & Supp. 1991). The relief sought in this proceeding directly affects the relief ordered in *United States and State of New York* v. *County of Westchester*, 89 Civ. 5274 (S.D.N.Y.) (*Westchester II*) an action brought to enforce the Ocean Dumping Ban Act of 1988 (Ban Act), 33 U.S.C. 1414b, 1414c, and to require Westchester to cease all ocean dumping of sewage sludge by December 31, 1991. C.A. App. 25-32. That action was settled by a federal Consent Decree entered in August 1989, as an order of the district court. Westchester Br. in Opp. App. A1-A70; Pet. App. A2-A3. The Consent Decree requires Westchester to phase out ocean dumping of its sewage sludge by December 31, 1991, and to implement both interim and long-term plans for land-based sludge management. *Id.* at A7-A17. Under the court-ordered schedule, Westchester must substantially complete and begin operation of a sludge dewatering facility by December 31, 1991. *Id.* at A10-A11.

1. The Ban Act is the culmination of a series of legislative and regulatory attempts since the 1970s to end ocean dumping of sewage sludge. In the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C.

1401 *et seq.*, Congress sought "to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. 1401. In 1974 and 1975, the United States Environmental Protection Agency issued permits to ocean dumpers requiring the complete cessation of ocean dumping by December 31, 1981. *United States* v. *County of Nassau*, 733 F. Supp. 563, 565 (E.D.N.Y.), aff'd, 907 F.2d 397 (2d Cir. 1990).

In 1977, EPA amended its regulations to require that each ocean dumper of sewage sludge end ocean disposal by December 31, 1981, unless the dumper obtained a special permit—to be issued at EPA's discretion—authorizing ocean dumping after that date. 40 C.F.R. 220.3(d); 42 Fed. Reg. 2468 (1977). In the same year, Congress amended the MPRSA to require an end to ocean dumping of sewage sludge by December 31, 1981.[2] More than 150 municipalities shifted to land disposal as a result of the 1977 amendments; after 1981, only nine localities continued to dispose of sewage sludge in the ocean. H.R. Conf. Rep. No. 1090, 100th Cong., 2d Sess. 25 (1988).[3]

In 1979, the United States filed suit against Westchester to enjoin violations of the amended MPRSA. *United States*

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[2] Pub. L. No. 95-153, § 4(a), 91 Stat. 1255. These amendments defined sewage sludge as "any solid, semisolid, or liquid waste generated by a municipal wastewater treatment plant the ocean dumping of which may unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems, or economic potentialities." Pub. L. No. 95-153, § 4(b), 91 Stat. 1255; see *City of New York* v. *EPA*, 543 F. Supp. 1084, 1109 (S.D.N.Y. 1981).

[3] The localities that continued the practice were Westchester, New York City, Nassau County and six New Jersey authorities.

v. *Westchester*, 79 Civ. 2186 (S.D.N.Y.) (*Westchester I*). After the district court in a related case concluded that the statute prohibited only ocean dumping that "unreasonably" degraded the marine environment (*City of New York* v. *EPA*, 543 F. Supp. 1084, 1086, 1088 n.3 (1981)), EPA entered into consent decrees with Westchester and the eight other remaining ocean dumpers, permitting continued dumping of sewage sludge into the ocean.[4]

2. On November 18, 1988, Congress enacted the Ban Act. The purpose of that Act is to end for all time the dumping of sewage sludge into ocean waters. See 134 Cong. Rec. 31,510 (1988) (statement of bill's sponsor, Sen. Lautenberg, explaining Conference Report). The Ban Act makes it "unlawful for any person to dump into ocean waters, or to transport for the purposes of dumping into ocean waters, sewage sludge or industrial waste." 33 U.S.C. 1414b(a)(l)(B).[5] The Act provides (a) that no later than August 15, 1989, all nine remaining ocean dumpers shall enter into agreements with EPA as a basis for the receipt of special permits to continue ocean dumping, and (b) that after December 31, 1991, ocean dumping of sewage sludge will be unlawful. 33 U.S.C. 1414b(a)(1).

Ocean dumpers, like Westchester, that are unable to implement a long-term plan to end ocean dumping by December 31, 1991, are required to operate under "enforcement agreements" that provide for payment of fees and penalties as well as mandatory schedules for coming into

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[4] Eventually, all ocean dumping was moved to a site established and monitored by EPA known as the 106-Mile Dump Site. H.R. Conf. Rep. No. 1090, 100th Cong., 2d Sess. 25-26 (1988).

[5] By redefining sewage sludge to include any solid, semisolid or liquid waste generated by a wastewater treatment plant (33 U.S.C. 1414b(k)(6)), the new Act "eliminated the loophole used by New York City to continue dumping after the [MPRSA deadline of] 1981." 134 Cong. Rec. 31,510 (1988) (statement of Sen. Lautenberg).

compliance. See 33 U.S.C. 1414b(c)(1), and (3). The Ban Act contemplates that such entities will implement an interim plan to eliminate ocean dumping. 33 U.S.C. 1414b(c)(2)(F) and (c)(3)(F). Congress intended these interim plans to provide an alternative means of meeting the statutory deadline. H.R. Conf. Rep. No. 1090, 100th Cong., 2d Sess. 29 (1988); 134 Cong. Rec. 31,510 (1988) (statement of Sen. Lautenberg).

3. All of the sewage sludge that Westchester dumps into the ocean comes from the Yonkers Joint Wastewater Treatment Plant (YJWTP), which treats approximately 65% of Westchester's sewage. C.A. App. 314-315.[6] Because Westchester planned to continue dumping sewage sludge into the ocean after August 15, 1989, it was required to obtain a permit and to negotiate an agreement with EPA providing for the phasing out of all ocean dumping by December 31, 1991. *Id.* at 315. The agreement was incorporated in the Consent Decree that was entered on August 7, 1989, in *Westchester II*. *Ibid.* EPA issued a special permit to Westchester, effective August 14, 1989, permitting it to continue its current practices while it completed the phase-out of all ocean dumping pursuant to the terms of the Consent Decree. *Id.* at 315-316.

The Consent Decree obligates Westchester to develop and implement a system of interim land-based management for all of Westchester's sludge by December 31, 1991. Section IV of the Consent Decree sets forth a schedule to which Westchester must adhere in order to meet this deadline for its interim management plan. Westchester Br. in Opp. App. A8-A12. [7] Failure to meet one milestone in this schedule

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[6] That facility generates about 1,350 tons of sludge daily, all of which is dumped in the Atlantic Ocean at the 106-Mile Dump Site. App., *infra*, 2a; note 4, *supra*.

[7] These milestones are:

1. *December 31, 1989*—Complete final design of the sludge

can undermine efforts to meet subsequent milestones and the ultimate goal of terminating ocean dumping by December 31, 1991. C.A. App. 321.

The Consent Decree contains detailed provisions for enforcing Westchester's obligations. Section VII of the Consent Decree establishes monetary penalties for noncompliance with the milestone schedules. Westchester Br. in Opp. App. A22-A31. Section X authorizes modification of the Consent Decree only upon the written consent of the parties or by order of the district court. *Id.* at A48. Section XII contains a force majeure provision, which excuses any delay that Westchester can show occurred for reasons beyond its control and despite its compliance with applicable statutes and regulations. *Id.* at A56-A62. Section XV states that the Consent Decree "in no way affects or relieves [Westchester] of responsibility to comply with any other Federal, State, or local law or regulation." *Id.* at A64-A65. Section XVIII provides that the district court retains jurisdiction to enforce the terms and conditions of the Con-

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dewatering equipment.

2. *February 1, 1990*—Advertise for sludge dewatering equipment.

3. *April 1, 1990*—Complete final design of the sludge dewatering facility.

4. *April 15, 1990*—Award contract for sludge dewatering equipment.

5. *May 15, 1990*—Advertise for bids for all contracts necessary to make the sludge dewatering facility operable.

6. *August 15, 1990*—Award all contracts necessary to make the sludge dewatering facility operable.

7. *September 1, 1990*—Issue Notice to Proceed for on-site construction of the sludge dewatering facility.

8. *October 1, 1990*—Commence on-site construction of the sludge dewatering facility.

9. *December 31, 1991*—Substantially complete and place into operation a sludge dewatering facility capable of processing and dewatering all of Westchester's sludge.

sent Decree and to resolve disputes as necessary or appropriate for implementation of the Consent Decree. *Id.* at A66.

4. After extensive analysis, Westchester decided to install its dewatering equipment as an addition to the YJWTP. C.A. App. 322, 397-399.[8] In February 1990, the Westchester County Board of Legislators approved the issuance of a "negative declaration" in connection with the selection of the YJWTP as the site for the new dewatering facility. *Id.* at 294-298, 322. Under New York State's Environmental Quality Review Act, N.Y. Envtl. Conserv. Law §§ 8-0101 *et seq.* (McKinney 1984 & Supp. 1991) (SEQRA), the negative declaration—*i.e.*, the finding that the project would not have a significant environmental impact—relieved Westchester of any obligation to prepare an environmental impact statement. *Id.* § 8-0109; see App., *infra*, 4a, 6a.

5. On March 20, 1990, petitioners filed this proceeding in state court under Article 78 of the New York Civil Practice Laws and Rules, N.Y. Civ. Prac. L. & R. §§ 7801-7806 (McKinney 1981 & Supp. 1991). They sought to annul the issuance of the negative declaration, alleging it violated SEQRA and "was substantially and primarily founded on the consideration to prevent casting the County of Westchester in violation of the consent decree signed with the Federal government." C.A. App. 49.

Westchester removed the Article 78 proceeding to the district court pursuant to 28 U.S.C. 1441(b), asserting that the relief sought therein "will have a direct and adverse impact upon the Federal Court Consent Decree" in *West-*

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[8] This analysis included the identification and comparison of 20 possible sites, and the preparation—in accordance with New York State's Environmental Quality Review Act, N.Y. Envtl. Conserv. Law §§ 8-0101 *et seq.* (McKinney 1984 & Supp. 1991)—of an Environmental Assessment of the effects of siting the facility at the existing YJWTP. App., *infra*, 3a-4a.

chester II. C.A. App 37.[9] In addition, the United States filed a motion in *Westchester II* under the All Writs Act, requesting that the district court retain jurisdiction over the instant case. C.A. App. 309-311.[10] Petitioners opposed this motion and moved to remand the Article 78 proceeding to state court. *Id.* at 438-440.

The district court refused to remand the case to the state court. It found that both actions should be considered by a single judge; since it already had the Consent Decree before it, it should also determine the Article 78 proceeding. C.A. App. 461-464. Accordingly, on May 24, 1990, the district court signed the All Writs Order, retaining jurisdiction of the Article 78 proceeding and enjoining any further litigation of that action in state court. Westchester Br. in Opp. App. A71-A72.[11]

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[9] The force majeure clause of the Consent Decree requires Westchester to exercise "due diligence and best efforts" to seek removal to the district court of any injunctive actions "directed against work actually being performed in furtherance of sludge treatment and disposal facilities." Westchester Br. in Opp. App. A57. The court-appointed Special Master who monitors Westchester's compliance in *Westchester II* informed the district court that Westchester would "be hard pressed to meet the December 31, 1991 deadline for the cessation of ocean dumping" if the relief sought in this case were granted. C.A. App. 433.

[10] The All Writs Act, 28 U.S.C. 1651, provides in pertinent part:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[11] The United States and the State of New York were granted intervenor status in the instant case. C.A. App. 22-24. The stipulated terms of intervention on the merits of the proceeding provided that "[i]n the event Westchester County is found to have violated state law, the [United States and New York] may participate as parties on the issue of the scope of relief or remedy, if any, to be ordered." *Id.* at 23.

On July 19, 1990, the district court dismissed the Article 78 proceeding on the merits. App., *infra*, 9a. The district court found that the proceeding was related to the Consent Decree action and that it had jurisdiction over the proceeding under the All Writs Act. *Id.* at 6a. On the merits, the court held that Westchester had complied fully with the state law in deciding to construct the dewatering facility at the YJWTP and that an environmental impact statement was not required. *Id.* at 6a-9a.

6. In the court of appeals, petitioners challenged both the district court's assertion of jurisdiction under the All Writs Act and the district court's dismissal of the Article 78 proceeding on the merits. On February 19, 1991, the judgment of the district court was affirmed in a summary order. Pet. App. A1-A4.[12]

On the issue of jurisdiction, the court of appeals held that a federal court may issue an order under the All Writs Act "to effectuate and prevent the frustration of orders it has previously issued." Pet. App. A3 (relying on *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172 (1977)). The court found that the district court had not abused its discretion in issuing the All Writs Order to prevent interference with the pending Consent Decree, because the record supported the conclusion that the preparation of an environmental impact statement would result in substantial delay and prevent Westchester from complying with the Consent Decree's schedule for phasing out ocean dumping

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[12] Under 2d Cir. R. 0.23, summary orders may be issued in cases "in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion." Summary orders, like oral statements, "do not constitute formal opinions of the court and are unreported and not uniformly available to all parties." They may not, therefore, "be cited or otherwise used in unrelated cases before [the Second Circuit] or any other court."

under the interim plan. Pet. App. A3.[13] The court also affirmed the district court's rulings that installation of a dewatering facility at the YJWTP would have no significant impact on the environment and that, therefore, Westchester's decision not to prepare an environmental impact statement was rational and supported by the record. *Id.* at A3-A4.

ARGUMENT

Petitioners contend (Pet. 5) that in this case "the 'All Writs Act' was misapplied because the outcome of this proceeding posed no threat to the implementation of the Consent Decree and because no Federal concern could be considered in determining the merits" of their state-law claim. The first contention is contrary to the express findings of both courts below, and presents simply a fact-specific question that turns on the precise requirements of the Consent Decree and the evaluation of the extent and effects of delays on those requirements. The second contention is contrary to this Court's consistent interpretation of the scope of the All Writs Act, and petitioners cite no decisions that support their proposed limitation on that scope.[14] In sum, the petition presents no issue warranting review by this Court.

1. This case involves the application of settled principles to a specific factual situation. Although petitioners assert that "the Article 78 proceeding must be seen as being in harmony with the Consent Decree, not as in frustration of it"

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[13] For this reason, the court rejected petitioners' contention that the fact that the Consent Decree does not relieve Westchester of its responsibility to comply with local law means that state court litigation is consistent with the purposes of the Decree. Pet. App. A3.

[14] Moreover, the unpublished summary order of the court of appeals has no value as precedent and may not be cited in unrelated cases. See note 12, *supra*.

(Pet. 5), they do not dispute the finding of both courts below that the record in this case demonstrates that if the relief sought in the Article 78 proceeding were granted and Westchester's "negative declaration" annulled, the resulting delay would jeopardize Westchester's ability to comply with the schedule set forth in the Consent Decree. Pet. App. A3, A14; C.A. App. 323, 328-329, 433. Instead, petitioners contend only that various Consent Decree provisions eliminate the possibility of conflict between the Article 78 litigation and the Consent Decree. The courts below correctly rejected this contention.

Petitioners rely primarily on Section XV of the Consent Decree (Westchester Br. in Opp. App. A64-A65), which provides that the Consent Decree "in no way affects or relieves the defendant of responsibility to comply with any * * * State or local law or regulation." This provision does not, of course, suggest that state court litigation will not interfere with achieving the purpose of the Consent Decree—the cessation of ocean dumping by December 31, 1991, as required by the Ban Act. *Id.* at A2-A3. Cf. *United States* v. *County of Nassau*, 733 F. Supp. at 566, 568 (concluding that essential purpose of similar Consent Decree entered in that case was to comply with Ban Act's requirement). The provision simply requires Westchester to follow state and local law in achieving that goal.[15]

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[15] For similar reasons, petitioners' reliance on the Consent Decree's force majeure clause, Section XII (Westchester Br. in Opp. App. A56-A62), is also unfounded. Petitioners assert that that provision would afford Westchester relief from the Consent Decree schedule if a judicial injunction interfered with Westchester's efforts to implement land-based disposal. But that provision, like Section XV, discussed above, does not obscure the fact that the fundamental purpose of the Consent Decree is the cessation of ocean dumping by December 31, 1991, as required by the Ban Act. *Id.* at A2-A3. In any event, contrary to petitioners' assumption (Pet. 6) that the relief sought by the Article

In any event, and despite petitioners' contrary protestations (Pet. 4 n.3), both courts below concluded that Westchester's selection of the YJWTP as the site for the dewatering facility complied with state law. Petitioners do not ask this Court to review that determination. *Ibid.* Accordingly, petitioners' reliance on Section XV of the Consent Decree to support their Article 78 litigation is unfounded. Moreover, even if Westchester's "negative declaration" had been improper under SEQRA, the district court, unlike the state court, would have confronted the task of fashioning a suitable remedy with a complete understanding of the effect of its actions on the Consent Decree. Cf. *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 864-865 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989).[16] Because

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78 proceeding would qualify as excusable delay under Section XII, invocation of the force majeure clause would require Westchester to show that it "has acted in accordance with applicable statutes and regulations" (Westchester Br. in Opp. App. A57)—a showing that it probably could not make if petitioners were to prevail in the Article 78 proceeding.

Similarly, the fact that the schedule set forth in the Consent Decree may be modified under some circumstances, see Section X (Westchester Br. in Opp. App. A48), does not implicate the purposes of the decree, nor make the schedule any less binding on Westchester. The Consent Decree, while representing an agreement among the parties, is also a court order "backed by the court's power to enforce compliance with it." See *SEC* v. *Levine*, 881 F.2d 1165, 1180 (2d Cir. 1989).

[16] Under New York State law, courts may eschew broad injunctive relief where, as here, strong economic or public interest considerations militate against returning to the status quo ante. See *Golden* v. *Metropolitan Transportation Authority*, 126 App. Div. 2d 128, 132-133, 512 N.Y.S.2d 710, 712-713 (2d Dep't 1987) (citing *Steubing* v. *Brinegar*, 511 F.2d 489, 495 (2d Cir. 1975) (applying same standard in context of federal environmental law) and *Riverdale Environmental Action Comm.* v. *MTA*, 638 F. Supp. 99, 102-103 (S.D.N.Y.), aff'd, 797 F.2d 110 (2d Cir. 1986)); see also *E.F.S. Ventures Corp.* v. *Foster*, 71 N.Y.2d 359, 373, 520 N.E.2d 1345, 1352, 526 N.Y.S.2d 56, 63 (1988).

the district court could best adjudicate and harmonize any conflicts which might have arisen between redressing a violation of SEQRA and enforcing the Consent Decree, it properly exercised its jurisdiction under the All Writs Act to protect the integrity of the Consent Decree. In sum, the possibility of delayed resolution, uncertainty, or inconsistent judicial orders from a state judge divorced from the issues in *Westchester II* is precisely the type of interference with an existing federal court order that the All Writs Act enables federal courts to prevent. Cf. *United States* v. *District of Columbia*, 654 F.2d 802, 809 n.16 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

2. Petitioners incorrectly assert (Pet. 6) that "the prerequisite for 'All Writs Act' jurisdiction is a supportable finding that the outcome of the [Article 78] proceeding should be * * * affected by Federal considerations inherent in the Consent Decree." Because SEQRA allegedly does not permit such considerations in evaluating the propriety of the "negative declaration," petitioners contend that the district court lacked jurisdiction under the All Writs Act to consider their Article 78 proceeding. *Id.* at 6-7. Petitioners cite no authority for this novel interpretation of the scope of the All Writs Act, which is inconsistent with the settled principle that "a federal court [may] issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Telephone Co.*, 434 U.S. at 172. Accord *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942); *United States* v. *International Brotherhood of Teamsters*, 907 F.2d 277, 280 (2d Cir.), aff'g 728 F. Supp. 1032, 1043-1048 (S.D.N.Y. 1990).

Moreover, judicial power under the All Writs Act may extend to all persons "who, though not * * * engaged in wrongdoing, are in a position to frustrate the implementa-

tion of a court order or the proper administration of justice * * * and encompasses even those who have not taken any affirmative action to hinder justice." *United States* v. *New York Telephone Co.*, 434 U.S. at 174; see *Labette County Commissioners* v. *United States ex rel. Moulton*, 112 U.S. 217, 221 (1884); accord *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d at 863.[17] The basis for All Writs Act

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[17] Recognizing the need for district courts to protect court-ordered relief against interference by third parties, courts of appeals have affirmed district court orders under the All Writs Act in a variety of circumstances. For example, *Yonkers Racing Corp.* v. *City of Yonkers, supra*, involved a federal district court's assertion of jurisdiction over an Article 78 proceeding brought in state court against the City of Yonkers by owners of land that the City sought to condemn in order to meet its obligations under a federal consent decree. 858 F.2d at 858. The Second Circuit upheld the district court's All Writs Act order directing Yonkers to remove the Article 78 proceeding to federal court "because removal was necessary to protect the integrity of the Consent Decree and because the issues raised [in the state court proceedings] cannot be separated from the relief provided by the Consent Decree." *Id.* at 865; accord *In re Baldwin-United Corp.*, 770 F.2d 328, 334-338 (2d Cir. 1985). See *Benjamin* v. *Malcolm*, 803 F.2d 46, 52-54 (2d Cir. 1986) (affirming district court order under All Writs Act joining Governor of New York as third-party defendant in prisoners' rights action and imposing mandatory injunctive relief against him), cert. denied, 480 U.S. 910 (1987); *Safir* v. *United States Lines, Inc.*, 792 F.2d 19, 23-24 (2d Cir. 1986) (affirming district court order under All Writs Act enjoining litigant from "further vexatious litigation"), cert. denied, 479 U.S. 1099 (1987); *United States* v. *International Brotherhood of Teamsters*, 907 F.2d at 280-281 (affirming district court order under All Writs Act enjoining subordinate entities from filing suits relating to pending consent decree except in consent decree court); *United States* v. *Wallace*, 218 F. Supp. 290 (N.D. Ala. 1963) (order under All Writs Act enjoining Governor of Alabama from interfering with court-ordered school desegregation). See also *United States* v. *District of Columbia*, 654 F.2d 802, 809-811 (D.C. Cir.) (upholding injunction against state court proceedings to protect Clean Water Act consent decree and court orders requiring selection and development of sludge disposal sites),

jurisdiction is thus the protection of the power of the federal court, not the legality *vel non* of the action to be enjoined. *A fortiori*, that jurisdiction is not affected by the scope of the questions involved in a proceeding to be enjoined.

3. Petitioners' final argument (Pet. 7) is that the All Writs Act was unconstitutionally applied in this case.[18] This argument rests on their hypothesis that their Article 78 proceeding posed no threat to achievement of the purposes of the Consent Decree, and, accordingly, that "there was no justification for usurping the State court's jurisdiction." The argument falls with the hypothesis. As we have explained, petitioners' contention that the Article 78 proceeding was consistent with the purposes of the Consent Decree was correctly rejected by both courts below. For that reason, their claim that there was no federal interest to justify the All Writs Order is plainly without merit. Because of the pending Consent Decree and the potential for inconsistent or conflicting orders, the district court had a substantial interest in the prompt and correct resolution of petitioners' state law claims. In short, the court of appeals correctly found that the district court did not abuse its discretion in using the All Writs Act to take jurisdiction of the related state proceeding.

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cert. denied, 454 U.S. 1082 (1981); *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974) (upholding injunction against state court proceeding to aid desegregation court order); *Mumford Cove Ass'n* v. *Town of Groton*, 647 F. Supp. 671, 688, 691 (D. Conn. 1986) (granting injunction against local administrative agency to prevent frustration of Clean Water Act consent decree); *Grenchik* v. *Mandel*, 373 F. Supp. 1298, 1300-1302 (D. Md. 1973) (granting injunction against state court proceeding to aid desegregation decree).

[18] They made no such claim in the district court or in the court of appeals. Petitioners may not now seek this Court's review of an issue they did not raise below. *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1991

APPENDIX

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 90 Civ. 2543 (WK)

IN THE MATTER OF THE APPLICATION OF THE LUDLOW PARK HOMEOWNERS ASSOCIATION, HENRY SPALLONE AS MAYOR OF THE CITY OF YONKERS, AND G. OLIVER KOPPELL, AS ASSEMBLYMAN FOR THE 80TH ASSEMBLY DISTRICT, PETITIONER

v.

THE COUNTY OF WESTCHESTER AND THE WESTCHESTER COUNTY BOARD OF LEGISLATORS, RESPONDENTS

for an order pursuant to CPLR Article 78 reversing and annulling the determination of the respondents to the effect that an environmental impact statement regarding the construction of a sludge dewatering facility at the Yonkers sewage treatment plant is not to be required.

July 19, 1990.

MEMORANDUM AND ORDER

WHITMAN KNAPP, District Judge.

Petitioners the Ludlow Park Homeowners Association, Henry Spallone and G. Oliver Koppell seek a judgment pursuant to C.P.L.R. Article 78 and the State Environmental

Quality Review Act ("SEQRA") reversing a determination by respondents the County of Westchester and the Westchester County Board of Legislators. For reasons which follow, we deny the petition.

BACKGROUND

The Ocean Dumping Ban Act of 1988 forbids ocean dumping of sewage sludge after December 31, 1991. In 1989, the United States and the State of New York brought suit against the County of Westchester and the Westchester County Department of Environmental Facilities, seeking to ensure that the County would comply with that statute. The action was resolved by a consent decree[1] establishing a timetable for the County's development of alternative means for disposing of its waste in accordance with the law.

The Yonkers Joint Wastewater Treatment Plant (hereinafter "YJWTP"), which the County has operated since 1955, each day produces approximately 1,350 tons of liquid sewage sludge, which is dumped into the ocean. Such dumping will, under the terms of the statute, become unlawful unless discontinued on or before December 31, 1991. Under the consent decree, the County must, by that date, construct a "dewatering" facility[2] capable of transforming the liquid sewage sludge into "sludge cake," which can be disposed of on land.

In June 1989, the County hired Blasland & Bouck Engineers, P.C., an engineering consulting firm, to evaluate various methods for transporting the liquid sewage sludge from the YJWTP to such a dewatering facility and to

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[1] *United States v. County of Westchester*, No. 89 Civ. 5274 (WK), September 6, 1989.

[2] A "dewatering" facility uses centrifuges to extract water from liquid sewage sludge. The resulting "dewatered" sludge is known as "sludge cake." The contaminated water extracted is known as "centrate."

identify possible sites for that facility. After assessing the relative environmental risks, cost-effectiveness and feasibility of several means of transporting liquid sewage sludge, the engineers concluded that the sludge might be transported by pipeline or by barge, but that the farther the liquid sewage sludge was transported the greater the risk of an accidental spill. With this in mind, the engineers identified twenty possible sites and ranked them according to the following criteria: (1) distance the liquid sewage sludge would have to be transported, (2) distance to the nearest park, recreational area, cultural or archeological resource, (3) distance to the nearest incompatible land use (*i.e.*, school, hospital, day-care facility), (4) impact on local traffic, (5) distance to the nearest residential area, (6) impact on ambient area quality, (7) impact on ambient air quality, (8) visual impact, (9) method by which the liquid sewage sludge would have to be transported, (10) site preparation required, (11) site topography and (12) whether the site was publicly or privately owned. Based on those criteria, they narrowed their investigation to what they determined were the eleven best sites.

The engineers then conducted a detailed comparative analysis of how the facility would be constructed and operated at each of those sites. Since the centrate generated at the dewatering facility would have to be further processed at the YJWTP, this stage of the engineers' analysis took into account, in addition to the above-listed criteria, how the centrate would be transported back to YJWTP. The report concluded that the best option would be to construct a 30′ × 50′ addition to the YJWTP. Among the advantages of building the facility as an addition to the YJWTP, rather than at a different site, were the elimination of environmental risks that would have accompanied transporting liquid sewage sludge from the centrate back

to the YJWTP and the low relative cost of constructing and operating the facility there.

Pursuant to 6 NYCRR § 617.5(b), the engineers went on to complete a Full Environmental Assessment of the environmental effects of locating the dewatering facility at YJWTP. The YJWTP is situated alongside MetroNorth railroad tracks. Across the tracks lies a residential area known as Ludlow Park. As the Environmental Assessment noted, that area has been designated a "critical environmental area, Type I" pursuant to 6 NYCRR § 617.11. After examining any effects the proposed facility would have on land, water, air, plant and animal life, agricultural, aesthetic, historical and archeological resources, recreational areas, transportation, energy, noise, odor, public health and the growth and character of the surrounding neighborhood, the engineers concluded that it would "not have a significant impact on the environment" and recommended that the County issue, pursuant to E.C.L. § 8-0109, a negative declaration stating that no environmental impact statement was called for.

On January 17, 1990, the engineers' study, the Full Environmental Assessment, and supporting documentation were submitted to the Westchester County Board of Legislators. On January 29, the Board's Committee on Budget and Appropriations conducted an open hearing, at which one of the consulting engineers discussed the study and answered the Committee's questions. The next day, the full Board held another open hearing. Present were thirteen of the seventeen members of the Board and approximately 100 residents and representatives of the media. At that hearing, the consulting engineer described the procedures used and recommendations made in the study. The Board also heard comments from some of the residents.[3]

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[3] On the basis of a resident's observations at the meeting, petitioners assert that several of the Board members declared that they had not

On February 1, the Committee recommended to the Board that it find that the proposed facility would not have a significant effect on the environment and issue a negative declaration. The Committee report stated that its recommendation was based on, *inter alia*, information gathered in the engineers' study, the Full Environmental Assessment,

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reviewed the engineers' report or the Full Environmental Assessment. Even if such an assertion were relevant to our review, we would conclude, based on the following exchange at oral argument, that the particular assertion here put forward is too flimsy to credit.

> MR. ZURHELLEN [For petitioners]: . . . [T]here was a meeting in our neighborhood among I think all the members or most of the members of the committee and this person, Mr. Feinstein, asked them whether they had even read the two books worth of documents that were submitted by county, and only two of the fourteen or fifteen people there said they had. The others did not.
>
> THE COURT: Did the others say they hadn't or just made no answer?
>
> (Pause)
>
> THE COURT: Off the record.
>
> (Discussion off the record) [with Mr. Feinstein]
>
> THE COURT: We will put on the record that the gentleman in the audience said he was there at the meeting and most of them just kind of shook their heads, I couldn't make out whether they were annoyed at the question or answering the question, at least from his view.
>
> MR. ZURHELLEN: I am advised by my client not only here but beforehand that there was an indication by the other members that they had not read the thing, whether it was a no or a shaking of the head, but Mr. Feinstein confirmed to me, the person who did the affidavit, that there was an indication of a negative.
>
> THE COURT: Beauty is in the eye of the beholder and if you are going to a meeting expecting to be annoyed at what you see, you will get annoyed by what you see.
>
> MR. ZURHELLEN: Could be.

Transcript of Oral Argument, May 30, 1990 at 15-16.

the hearings and a review of the criteria listed in NYCRR § 617.11.

On February 5, the Board issued a resolution reciting that "the County must now proceed with the preparations for implementing a dewatering facility, while it simultaneously investigates substitute methods, in order to meet the milestone deadlines set forth in the consent decree and avoid monetary penalties that could be imposed for failure to meet those deadlines" and determining that, based on its review of the engineers' study, the Environmental Assessment and "all other relevant supporting documentation," a negative declaration should be issued.

On March 22, 1990, a group of Ludlow Park residents opposed to further development of the YJWTP site, the mayor of the City of Yonkers and the state assemblyman for the Ludlow Park area commenced this Article 78 proceeding in the Supreme Court of New York, County of Westchester, seeking to reverse the Board's determination. Respondents removed to this court, where the action was deemed related to the one in which the consent decree had been filed. On May 10, 1990, we determined to exercise jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651.

DISCUSSION

Under SEQRA, respondents were required to determine whether constructing a dewatering facility at YJWTP would have a "significant effect" on the environment and, if they so determined, to cause an environmental impact statement to be prepared. 6 NYCRR 617.1(c). In this Article 78 proceeding, we review respondents' determination that no such statement was required to decide whether or not it "was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion. . . ." C.P.L.R. § 7803(3), *Pell v. Board of Edu-*

cation (1974) 34 N.Y.2d 222, 230-32, 356 N.Y.S.2d 833, 839-40, 313 N.E.2d 321; *Colton v. Berman* (1967) 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 651, 234 N.E.2d 679. We are required to conclude that the determination was proper if, in making it, respondents identified all areas of concern, took a "hard look" at the issues involved, and made a "reasoned elaboration" for the basis of their finding that the facility would have no signficant environmental effects. *Jackson v. New York State Urban Development Corp.* (1986) 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305, 494 N.E.2d 429. Our role is not "to weigh the desirability of any action or choose among alternatives, but to assure that [respondents have] satisfied SEQRA, procedurally and substantively." *Id.*

Petitioners make four principal arguments against the respondents' determination. They contend that the Board (1) improperly based its findings on the study and the Full Environmental Assessment rather than on reasons expressly enumerated in its resolution; (2) impermissibly took into account the deadlines established in the consent decree; (3) failed adequately to consider the effect of any additional traffic required to remove the sludge cake from the facility; and (4) did not give due deference to the fact that the Ludlow Park area has been deemed "Type I." We find these arguments to be without merit.

We follow *Stewart Park and Reserve Coalition v. New York State Department of Transportation* (3d Dept.1990), 157 A.D.2d 1, 555 N.Y.S.2d 481, 484 in concluding that the Board's basing its resolution on the recommendations in the report and Environmental Assessment was entirely proper under *Jackson, supra,* in the absence of any indication that reliance on the engineering consultants was unreasonable.

We also see nothing improper in the resolution's recitation of the fact that the County, under the terms of the

consent decree, was bound to meet certain deadlines. The Board, of course, could hardly have made its decision to construct a dewatering facility without reference to that fact. The circumstance that, as petitioners insinuate, the deadlines in the consent decree might conceivably have provided respondents with a motive for not complying with the applicable legal standards is simply a red herring; the issue to be determined is whether or not they complied, not why they might not have complied.

Nor can we say that respondents failed to identify and take a hard look at the traffic issue. To the contrary, the Full Environment Assessment supported its conclusion that transporting the sludge cake from the facility would not result in the generation of traffic significantly above current levels with the following discussion:

> The only traffic generated by the operation of the proposed facility will result from the transportation of the dewatered sludge to its disposal location and employees going to work and leaving work. Approximately six trucks per day will be required for the transportation of dewatered sludge from the YJWTP to the disposal facility. Potential impacts to local traffic are expected to be insignificant based on the amount of traffic generated as a result of two new employees and five additional truck [sic] entering and leaving the YJWTP per day (Part 3, p. 11).

Petitioners insist that, by their calculations, a total of ten or twelve trucks—rather than five—will be required. Even if petitioners should turn out to have been correct in this prediction, it would not follow that the Board had arrived at its contrary determination, based on the engineers' study and the Full Environmental Assessment, arbitrarily, capriciously or in an abuse of discretion.

Finally, we note that the Ludlow Park area's designation as Type I, which was specifically noted in the Full Environmental Assessment and the negative declaration, did not command a determination that an environmental impact statement was required; it merely made such a determination "more likely." 6 NYCRR § 617.11; *Jaffe v. RCI Corp.* (3d Dept. 1986) 119 A.D.2d 854, 500 N.Y.S.2d 427, 429. Where, as here, the County followed the appropriate procedural requirements for a Type I area, "the issue distills to whether its conclusion that the proposed project would have no significant impact on the environment is a rational one which is supported by the record." *Id., citing Matter of Inland Vale Farm Co. v. Stergianopoulos* (1985) 65 N.Y.2d 718, 492 N.Y.S.2d 7, 481 N.E.2d 547. Based on our examination of the record, we find that it is.

CONCLUSION

We deny the petition.

SO ORDERED.

U.S. GOVERNMENT PRINTING OFFICE: 1991—282 061/20640